IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC12-657

STATE OF FLORIDA,

Petitioner,

vs.

HARRY JAMES CHUBBUCK,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

MELANIE DALE SURBER
Assistant Attorney General
Florida Bar No. 0168556
1515 N. Flagler Drive
Suite 900
West Palm Beach, Florida 33401
crimappwpb@myfloridalegal.com

Telephone: (561) 837-5000
Fax: (561) 837-5099

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by information with Trafficking in Cocaine (28-200 grams), Possession of Cocaine with Intent to Sell, Possession of Paraphernalia (Production), and Felon in Possession of Firearm or Ammunition (R 19-20). Upon a plea of guilty the Defendant was sentenced to 5 years of probation with special conditions (R 97-100, 105-109). This included the condition that he "abstain entirely from the use of alcohol and/or illegal drugs . . ." (R 107). Thereafter, a warrant was issued alleging that the Defendant violated probation when he tested positive for cocaine in a urinalysis (R 115-121, 124, 127).

At a hearing on violation of probation the State's position was that the trial court could either place the Defendant back on probation or, if probation were revoked, to sentence him to the bottom of guidelines which was 37.65 months in prison (T 4, 21). The Defendant requested that he be sentenced to time served (T 6).

The Defendant testified that he was a decorated veteran, and he was shot down four times on December 7, 1967 (T. 8). He

underwent treatment for PTSD at the VA (T. 8). The Defendant's fiancée testified that the Defendant struggles with his health (T. 9). Defense counsel alleged that the defendant suffered from PTSD, Melanoma, COPD, and Hepatitis C (T. 14).

After hearing testimony from the Defendant and another witness, the trial court announced that he would not consider a prison sentence (T 19). The trial court also stated that the Department of Corrections would be unable to address any of the Defendant's issues (T 19).

The Defendant advised the Court that he takes the following medications; Combivent, Albuterol, Krephisin, Spiriva, an Aspirin regimen, Lipsid, Medforman, Prozac, and Zoloft (T. 23).

The Defendant requested a mitigated sentence because he required specialized treatment unrelated to substance abuse and that he was amenable to treatment (T 25-26). The State countered that: "there's been no factual basis in order for the Court to depart based upon the Defendant's physical condition or psychiatric condition based upon the fact there's been no testimony or no evidence presented that the Department of Corrections would ill-equipped [sic] to treat the defendant" (T 27).

The trial court then found as follows:

> Here's what I'm going to do. These issues have been going all around the state. The Court recognizes that it must abide by

> the law, and the State has to decide to exercise it's own discretion when to appeal things.
>
> I'm going to make this very simple for the Appellate Court and for the State Attorney's Office. And I don't say this with any malice. The defendant does not belong in prison, and it's absurd to have a 66-year-old man, who put his life on the line for our country, and has the problems he now has under the supervision of the Department of Corrections. It's just called ludicrous.
>
> The defendant has spent 97 days in jail because he tested positive for cocaine, even if he used cocaine. I question whether anybody in this courtroom or this world, who went what this defendant when through in Vietnam when people like me sat home in our own living rooms and watched the war on television, would have handled this any better than the defendant.
>
> The defendant is not accused of committing any new crimes. He is 66 years old. He has so many problems now dealing with mental health and physical problems. The common sense says enough is enough.

(T 28-29).

The Defendant entered a defense-prepared six page document which covered his military history and his mental health issues (T 30). The trial court then accepted the Defendant's admission of violation of probation, revoked probation, and sentenced him to credit for time served of 97 days in jail (T 31).

On appeal, the State argued that the trial court erred when it granted a downward departure because Chubbuck failed to establish that he needed specialized treatment. Specifically the state argued that Chubbuck offered no evidence that the Department of Corrections could not provide the required treatment for his mental and physical disorders. State v. Chubbuck, 83 So. 3d 918 (Fla. 4th DCA 2012).

The Fourth District Court of Appeal receded from its decision in State v. Gatto, 979 SO. 2d 1232 (Fla. 4th DCA 2008), and instead adopted a concurring opinion, written by Judge Warner in State v. Hunter, 65 So.3d 1123, 1125-26 (Fla. 4th DCA 2011), and found that the plain language of subsection 921.0026(2)(d) does not require the defendant to establish that the Department of Corrections could not provide the necessary treatment. Id. at 921-922. The Court certified conflict with State v. Scherber, 918 So.2d 423, 424-25 (Fla. 2d DCA 2006); State v. Wheeler, 891 So.2d 614, 616 (Fla. 2d DCA 2005); State v. Green, 890 So.2d 1283, 1286 (Fla. 2d DCA 2005); State v. Mann, 866 So.2d 179, 182 (Fla. 5th DCA 2004); State v. Tyrrell, 807 So.2d 122, 128 (Fla. 5th DCA 2002); State v. Thompson, 754 So.2d 126, 127 (Fla. 5th DCA 2000); State v. Abrams, 706 So.2d 903, 904 (Fla. 2d DCA 1998); State v. Ford, 48 So.3d 948, 950 (Fla. 3d DCA 2010); and State v. Holmes, 909 So.2d 526, 528 (Fla. 1st DCA 2005). This appeal follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal improperly found that the plain language of Florida Statutes subsection 921.0026(2)(d) does not require the defendant to establish that the Department of Corrections could not provide the necessary treatment. If a defendant is seeking a downward departure because he requires specialized treatment, the need for a departure is eliminated where the same treatment is available in the Department of Corrections. It stands to reason that if the defendant can receive the treatment in the Department of Corrections, the defendant is not eligible for a downward departure.

ARGUMENT

The Fourth District Court of Appeal erred when it found that the Defendant was not required to prove that the mental health treatment he needed was unavailable, in the prison system, in order to obtain a downward departure sentence under section 921.0026(2)(d), Florida Statutes.

I. Standard of review

The standard of review of a case dealing with certified conflict is de novo. Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004). Questions of statutory interpretation are subject to de novo review. Mendenhall v. State, 48 So.3d 740 (Fla. 2010).

II. Discussion on the merits

In order to determine whether a departure sentence below the minimum sentence required under the guidelines is appropriate, the trial court must follow a two-step process. Banks v. State, 732 So. 2d 1065, 1067 (Fla. 1999). First, the trial court must determine whether there is a valid legal basis for the departure sentence that is supported by facts proven by a preponderance of the evidence. Id.; § 921.002(1)(f), Fla. Stat. (2010) ("The level of proof necessary to establish facts that support a departure from the sentencing guidelines is a preponderance of the evidence."). Secondly, the trial court must determine whether a departure sentence is the best sentencing option for the defendant by weighing the totality of the circumstances in the case, including the aggravating and

mitigating factors. Id. This case deals with whether or not Chubbuck presented a valid legal basis for a departure. The State contends that because the defendant failed to establish that the treatment he required was unavailable in the Department of Corrections, he had not established a valid legal basis for a downward departure pursuant to Florida Statute § 921.0026(2)(d).

In State v. Chubbuck, the Fourth District Court of Appeal addressed the propriety of requiring a defendant to establish that the specialized treatment he needs is unavailable in the Department of Corrections. The Court found that the plain language of subsection 921.0026(2)(d) does not require the defendant to establish that the Department of Corrections could not provide the necessary treatment. Chubbuck[1], 83 So. 3d at 922. Rather, the Fourth District Court of Appeal adopted the concurring opinion of Judge Warner from State v. Hunter, 65 So.3d 1123, 1125-26 (Fla. 4th DCA 2011), and found that:

> Sentencing statutes must be strictly construed according to their letter. See Perkins v. State, 576 So.2d 1310, 1312 (Fla.1991); Atterbury v. State, 991 So.2d 980, 981 (Fla. 4th DCA 2008). In sentencing, the trial judge should strictly follow the dictates of statutes. See Troutman v. State, 630 So.2d 528, 533 n. 6 (Fla.1993), superseded by statute on other grounds as stated in Ritchie v. State, 670 So.2d 924 (Fla.1996). In addition, the rule of lenity requires that when language of a statute is susceptible of differing constructions, it must be construed most

[1] Judge Warner's reasoning has been adopted in its entirety by the Fifth District Court of Appeal, in State v. Owen, 95 So. 3d 1018 (Fla. 5th DCA 2012).

favorably to the accused. See § 775.021(1), Fla. Stat. (2008).

> By requiring the defendant seeking downward departure from a criminal punishment code sentence to prove that services to treat his or her medical condition are unavailable in prison, the courts have placed an additional burden on the defendant which is not required by the Legislature. **In fact, nothing in the legislative history[2] even hints that in order to justify a downward departure on this ground, services must be unavailable in prison to treat the condition.** While that might be what the Legislature intended, I think it should state its intentions clearly so that no one has to guess as to the requirements in punishment statutes.
>
> The burden of proving a negative, i.e. that no treatment options exist in the prison system, is problematic for the defendant and defense attorneys. For instance, in this case the expert testified that she had been unable to reach Department of Corrections officials to have them explain their treatment procedures in the prison system. Instead she relied on other information, including her work with former inmates and the general protocols for treating mental illness, as well as other information which might be considered hearsay.
>
> The prison system is a very large institution with very large medical facilities. To track down all of the available treatment in the system may be a daunting and very expensive task, adding to an already overburdened public defender system. On the other hand, the information on availability of treatment is readily available to the state. I think the state is

[2] Undersigned has reviewed the legislative history and in fact there is no explanation regarding the meaning of the term specialized.

> in the better position to offer such proof in opposition to a downward departure.
>
> Hunter, 65 So.3d at 1125-26 (Warner, J., specially concurring) (emphasis in original).

(Emphasis Added).

In this case, the Court broke the first rule of statutory construction and evaluated the legislative history before evaluating the plain meaning of the statute. "[T]he plain meaning of statutory language is the first consideration of statutory construction." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). "A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." Larimore v. State, 2 So.3d 101, 106 (Fla.2008). "As with any case of statutory construction, [the Court must begin] with the 'actual language used in the statute.' " Heart of Adoptions, Inc., 963 So.2d at 198 (quoting Borden v. East-European Ins. Co., 921 So.2d 587, 595 (Fla.2006)). "This is because legislative intent is determined primarily from the statute's text." Id. This Court has explained:

> [W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning ... the statute must be given its plain and obvious meaning. Further, we are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.

> To do so would be an abrogation of legislative power. A related principle is that when a court interprets a statute, it must give full effect to all statutory provisions. **Courts should avoid readings that would render part of a statute meaningless**.

Velez v. Miami-Dade Cnty. Police Dep't, 934 So.2d 1162, 1164-65 (Fla.2006) (*quotation marks and citations omitted*).

Here, the Fourth District Court of Appeal, ignored the plain text of the statute, and instead found that the Courts of Appeal have supplemented the plain language of the statute with the further requirement that, "[i]f a departure is to be permitted on such ground, the defendant must also establish, by a preponderance of the evidence, that the Department of Corrections cannot provide the required 'specialized treatment'" Chubbuck, 83 So. 3d at 921. This reasoning is well beyond the plain text of the statute, and effectively renders the term "specialized" meaningless.

Turning to the statute at issue, Florida Statute § 921.0026(2)(d) states as follows:

> (2) Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:
>
> * * *
>
> (d) The defendant requires **specialized** treatment for a mental disorder, that is unrelated to substance abuse or addiction, or

> for a physical disability, and the defendant is amenable to treatment.

The term specialized can be defined as follows:

> 1: characterized by or exhibiting biological specialization; especially: highly differentiated especially in a particular direction or for a particular end
>
> 2: designed, trained, or fitted for one particular purpose or occupation.

Merriam-Webster.com., 2012. http://www.merriam-webster.com (4 February, 2012).

Additionally, the term specialized, has been used by the legislature as it relates to rehabilitative treatment for inmates. Specifically, Florida Statute § 945.12(1) states as follows:

> The Department of Corrections is authorized to transfer substance abuse impaired persons, as defined in chapter 397, and tuberculous or other prisoners requiring **specialized services** to appropriate public or private facilities or programs for the purpose of providing **specialized services or treatment** for as long as the services or treatment is needed, but for no longer than the remainder of the prisoner's sentence.

(Emphasis Added).

Furthermore, in Florida Statute § 958.11 (3)(c), which deals with programs for youthful offenders, the legislature again used the term specialized as follows:

> (3) The department may assign a youthful offender to a facility in the state correctional system which is not designated for the care, custody, control, and supervision of youthful offenders or an age group only in the following circumstances:
>
> ***
>
> c) If the youthful offender needs medical treatment, health services, or other **specialized treatment otherwise not available at the youthful offender facility**.

(Emphasis Added).

Thus it is clear, based upon a review of statutes that use the word "specialized" that legislature defines "specialized treatment" as treatment that is unavailable in the Department of Corrections.

Although the decision in State v. Spioch, 706 So. 2d 32 (Fla. 5th DCA 1998), seems to support the premise that the defendant is not required to establish that the necessary treatment is unavailable in the department of corrections, the decision in Spioch is a misinterpretation of the statutory language. In Spioch, Judge Griffin stated that:

> [A] lack of available treatment in prison is not required under the statute. Although illness is not a "get out of jail free card," a treatable physical disability is one of the circumstances where the legislature has chosen to re-invest trial judges with discretion to vary from sentencing guidelines.

Id. at 36. Moreover, the unavailability of appropriate treatment was in fact considered by the Court. The Court also reasoned that given the nature and extent of Mrs. Spioch's illnesses, successful treatment in prison was doubtful. Id. at 36(emphasis added).

Thereafter, in State v. Abrams, 706 So. 2d 903 (Fla. 2d DCA 1998), and all of the cases that have followed[3], the Courts have correctly found that a downward departure is properly denied where the defendant fails to show that he required specialized treatment that could not be provided by the Department of Corrections.

Given the language of Florida Statute § 945.12(1) and Florida Statute § 958.11 (3)(c), the Abrams Court and its progeny properly interpreted the meaning of the term specialized with respect to Florida Statute § 921.0026(2)(d). If a defendant is seeking a downward departure because he requires specialized treatment, the need for a departure is eliminated where the same treatment is available in the Department of

[3] Including but not limited to, State v. Gatto, 979 So.2d 1232, 1233 (Fla. 4th DCA 2008); State v. Green, 971 So.2d 146, 148 (Fla. 4th DCA 2007); State v. Scherber, 918 So.2d 423, 424-25 (Fla. 2d DCA 2006); State v. Wheeler, 891 So.2d 614, 616 (Fla. 2d DCA 2005); State v. Green, 890 So.2d 1283, 1286 (Fla. 2d DCA 2005); State v. Mann, 866 So.2d 179, 182 (Fla. 5th DCA 2004); State v. Tyrrell, 807 So.2d 122, 128 (Fla. 5th DCA 2002); State v. Thompson, 754 So.2d 126, 127 (Fla. 5th DCA 2000).

Corrections. It stands to reason that if the defendant can receive the treatment in the Department of Corrections, the defendant is not eligible for a downward departure. Thus, this Court must reverse the decision of the Fourth District Court of Appeal as it is a complete misinterpretation of the plain text of Florida Statute § 921.0026(2)(d)and remand this case for resentencing.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court reverse the Fourth District's ruling in this matter, and hold that before a defendant is eligible for a downward departure pursuant to Florida Statute § 921.0026(2)(d), he must first establish that the specialized treatment is unavailable in the department of corrections.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

//s Celia Terenzio
CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

//s Melanie Dale Surber
MELANIE DALE SURBER
Assistant Attorney General
Florida Bar No. 0168556
1515 N. Flagler Drive

Suite 900
West Palm Beach, FL 33401
crimappwpb@myfloridalegal.com
Telephone: (561) 837-5000
Counsel for Respondent
Fax: (561) 837-5099

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Merits Brief" has been furnished by Electronic Mail to: Paul Petillo, Esq., Assistant Public Defender, appeals@pd15.state.fl.us this 7th day of February, 2013.

MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on February 7th 2013.

MELANIE DALE SURBER